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Each of the three points which have been noted illustrates a marked artificiality involved in the discussions of perception. A problem arising within a given context may be a problem within that context, but if abstracted from the background on which it is displayed it may be no problem at all. Or, again, a problem may be a problem not only within a context, it may become so *because of* the context. If the context is genuine, the problem is real, but if the context itself is the result of false or inadequate analysis, the problem becomes artificial.

The discussion of the topic of perception, as outlined in the historical sketch which has been given, illustrates both types of artificiality. The artificiality, the attempt has been made to show, is unescapably bound up with the tradition. To avoid it, therefore, necessitates a new point of departure and a new method of approach.

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THE CASE METHOD IN ETHICS AND ITS CRITICS¹

SURELY criticism of a new movement was never more kindly and constructive than here. Professor Overstreet showed a generous appreciation which makes me feel that it should be taken like Robert Browning's praise of early Italian painters "for daring so much before they well did it." Professor Powell has laid us all under obligation in giving a more reasoned and detailed apologia of the case system in law than I have seen elsewhere; and his recognition that such a system may, with propriety and value, be applied to ethics is reassuring and welcome. I have also received valuable comments from many sources through personal letters whose authors I may not quote, but whose criticisms I will endeavor to meet. If I fail to meet the intent of the critics they will render me a service by pointing out my failure, as I have no pride of opinion in the matter.

Let me then in brief space reply to one or two general criticisms. First, I have never proposed the case method except as a propædeutic to ethics,² and I have acknowledged many of the difficulties inherent in such a method of teaching. Yet I would reserve the right to consider it the only method if, after due consideration, other methods should come to appear futile.

¹ These articles will be referred to by the numbers here attached, *viz.*: my paper (1) "The Case Method in the Study and Teaching of Ethics," this JOURNAL, Vol. X., page 337. (2) Professor H. A. Overstreet's "Discussion"; "Professor Cox's Case Method in Ethics," *ibid.*, Vol. X., page 464. (3) Professor Thomas Reed Powell's "The Study of Moral Judgments by the Case Method," *ibid.*, Vol. X., page 484.

² Cf. (1), page 343.

Then, I have been criticized by many, including a distinguished Justice of the Supreme Court of Massachusetts, for limiting my study to actual decisions. I may confess that in the class-room I do not so limit it. In my paper, necessarily brief (as this one must be), it was difficult to explain how cases which did not involve actual decisions were weighed; and I was, as the issue proved, justly fearful of being charged with the study of *mere opinion*. Inasmuch as judicial decisions are social acts, a theory built upon them can not, with propriety, be called subjective; but when I speak of judicial decisions I would not be understood to refer only to decisions of municipal, state, or federal courts. I referred rather to decisions made "by the authorities of the group to which men belong" whatever that group may be. For class-room purposes faculty judgments on student conduct, decisions of inter-fraternity councils, athletic committees, etc., have proved to be very valuable. Then, there are readily accessible decisions (acts) of other social groups, such as labor unions, manufacturers' associations, social clubs, and the like. I know of no kind of organization more capable of making judgments and carrying them out than Society, spelled with the capital letter, and sometimes those decisions are articulated by a recognized leader.

With reference to cases which do not come to actual decision, I would say this. Where there is general agreement respecting the probable outcome, these cases weigh in one's judgment as to the character of the law implied. Many newspaper cases from contemporaneous life are imperfectly stated and the conclusion is implied only: yet there is no least doubt as to the issue. For example, many cases of lynching are recorded by the newspapers. It is not difficult to supply the details for the whole case. One knows that under certain conditions, in particular localities and times, homicide is not only condoned, but applauded; nor does one have to go to records (which, *du reste*, are easily obtainable) to know that homicide under duelling conditions meets with the same judgment in some localities, and that killing in war is equally honorable, though our squeamish modern age professed to be shocked at the exploits of a recent redoubtable occupant of the Presidential Chair.

When, however, we come to the analysis of the judgments (acts) of individuals reacting to a situation, I confess myself unwilling to base any theory upon them, since the interpretation of such acts is so largely individual and so easily mistaken. The judge before mentioned warned me that not all legal decisions were *law*. I may be permitted to return to this in connection with Professor Powell's criticisms: but here let me say that every legal decision is *law* in a most emphatic sense for either defendant or plaintiff in any actual case.

PROFESSOR OVERSTREET'S CRITICISMS³

"The facts with which ethics is concerned are decisions of a certain type. In the end, to be sure, the ethical question is, what *ought* the decisions to be."⁴ If I understand this, it is a begging of the whole question in the interest of that view of ethics which emphasizes its *normative* character and thereby removes it altogether from the realm of science. We may readily grant that *there is an ought* in every moral situation. No man would ever do anything, *deliberately*, unless for some reason he thought that he ought to do so. For this reason such a study as Professor Sharp's referred to by me before⁵ is a valuable study in psychology especially for those who wish to influence other men to pursue a particular line of conduct. It does not seem to me to help us to determine what right conduct is or whether there is any such thing. Inductive studies seem to show pretty plainly that what a man *owes* to his group is determined by (1) instinct, (2) custom, (3) habit, (4) approvals of the elders.⁶ These *may* be followed by some rational judgment concerning the value of particular acts for the individual and his group. His *sense* of duty can not develop except in connection with some particular society. I have expressly repudiated⁷ the study of cases of conscience. One may study them as one studies any other subject—psychologically. The sophistic mob leader, whether in church or state, may study them in order to handle men better, or the lawyer to win cases, etc., but they are not the proper material for an objective study of ethics.

The objectivity which I have sought by means of an appeal to historical cases alone "would seem" says Professor Overstreet "to be purchased by the author at the altogether disastrous price of surrendering ethics for history"; and he does not think that I can really mean "to sell out for so cheap a mess of potage," but he thinks me "seriously ambiguous upon the point."

In so far as I by no means confound such a study as mine with history, I may reassure him; but only in so far as, for example, economics is not history, yet derived immediately from history, which, moreover, may easily be contemporaneous. The time element need not enter in. It would be vain to seek for a definition of history which would not be seriously challenged; but there can be no manner of doubt that history, far from being a mere record, is a series of constructions, interpretations, whose subject-matter is the clashes of various groups, social, political, economic, religious. As a unit, from

³ Cf. (2), *passim*.

⁴ Cf. (2), page 464.

⁵ "The Influence of Custom on the Moral Judgment," F. C. Sharp.

⁶ Cf. Dewey and Tufts "Ethics," Ch. IV.

⁷ Cf. (1), page 342.

the standpoint of a particular historian, it is quite naturally not any one of the disciplines implied above, but equally is it each one of these disciplines when it treats of the conflicts incidental to them.

But, says Professor Overstreet, "history, for all its seeming security, is not a consensus; . . . all the while that the student has been studying the historic judgments he has either been making upon them his judgment of 'ought,' *i. e.*, his judgment of moral value, or he has been utterly unable either to discover the moral trend of the historic succession or to pass judgment upon the contemporary situation."

I readily agree that history is not a consensus, but I by no means agree with what seems to be the implication, *viz.*, that there is no objective law to be deduced from history. In situations, however diverse and widely separated, and in the face of the possibility that the "latest" development of the contemporaneous situation may seem "lower" than much that has gone before, I maintain that there is a principle discoverable, under rigid tests, which will have all the certainty that one could desire. If, now, we should find that, under infinitely diverse conditions, men always do act according to a certain principle (*e. g.*, that of self-preservation), then it would be idle to tell them that they *ought* to act differently. I am assuming, as is evident, that no negative instances have been found. I have made no claim that such will be the case. My tentative conclusions that "The individual may do as he will so long as he does not deny his own nature and purpose in life," and "Individuality is the goal of social progress," have been supported by just such evidence, but in the absence of published cases I must make them with apparent dogmatism.⁸

PROFESSOR POWELL'S CRITICISMS

Professor Powell has so supplemented my imperfect paper from many points of view, and I am so grateful to him for this, that my response must be, in the main, merely to clear up obscure points. Yet in some ways I must take issue with him.

"No satisfactory criterion can be discovered in the sources themselves, as those jurists know who have struggled vainly to distinguish what is *malum in se* from what is merely *malum prohibitum*."⁹

⁸ In reply to the statement [(2), p. 466] "The paper does not indicate clearly the character of the cases studied (whether merely legal, or more broadly social, or even individual), the sources from which they are drawn, the kind of examination to which they are subjected for *ethical* purposes, and the type of *ethical* conclusions drawn." This is true. I can not do so here in the brief space at my command, and my critic's indulgence, as well as that of other readers, must be asked until a case book can be prepared and published. The aid of all well-disposed persons is asked to this end.

⁹ Cf. (3), page 484.

First note that *malum* is sufficient designation for anything which is wrong; but wrong is relative. What courts, acting as representatives of civil bodies, call *mala prohibita* are merely those more tangible (and usually grosser) undesirable things, to permit which would endanger the very existence of the group in question. Social inertia is such that no action is taken until life (of the group) is threatened. "Rebaters" do indeed "go to dinner parties" (they may be the life of the party!), but pickpockets are barred. *They* would be fatal. It is not strange that jurists have failed to distinguish between these *mala*, for the difference is one of degree only. Again "as it is not safe to infer moral condemnation from legal prohibition or regulation, so it is equally dangerous to assume that the group approves of what it does not punish." There seems to be a failure here to change jurisdictions. Rebaters are not dangerous to dinner parties; pickpockets are. Both come before civil courts; but the latter come also before the court of dinner-givers. It seems to me perfectly safe to infer moral condemnation from legal prohibition. The infraction of any law, however trivial and silly, doomed to repeal at the earliest date, is none the less an infraction, and immoral *in so far*. We have a loose way of speaking of one frankly unlawful as none the less "quite a moral man," because he does not get drunk, pickpockets, or commit adultery, but there is high authority for the belief that "whosoever shall keep the whole law and yet offend in one point, he is guilty of all."

"In some jurisdictions adultery is not a crime." True; but how does Professor Powell know (as he assumes) that adultery *is* none the less a crime? Is it not because he is familiar with civil groups and courts which have *declared it* to be such? To insist (I fancy that he would not do so) that in the sight of God or before an ideal ethical law, it is always a crime, is to beg the whole question. The comparison of judgments of different groups under different conditions and at many periods of history is just that process which will enable us to obtain the "legal mind" which has been instanced in his article. Begin to study the history of adultery from the sources; call the acts which are now conceived to make up that crime always by the name adultery, and it is easy to see that one can readily find groups where "it is not a crime."

My contention is that there are principles implied in the persistent judgments of all groups at all times which patient research will, probably, reveal. *They are not yet found.* If the case method as applied to ethics shall obtain any following, then there are years of arduous research ahead for many investigators. The kindly judgment of the two critics cited encourages me to hope that there will

be others to use the method. From many unexpected sources has come encouragement to persist, and the new year has brought a much larger enrollment to my class, which will make the test of greater value. A veteran English philosopher, otherwise approving, calls my law "that each organism or organization applauds its upholder and condemns its threatener"¹⁰ "merely formal," "a mere statement of the tendency to social preservation which sanctions every institution." Agreed. The law was not announced as very important (although it has importance), but because it was the only one thus far discoverable. For practical guidance to right living it is as fruitless as the Categorical Imperative itself! Professor Powell says¹¹ "that the application of the case system to the teaching of ethics has possibilities of incalculable service in training the capacity to form moral judgments seems beyond dispute. This alone justifies extensive experiment. Those who hope that it may result in giving us simpler and more definite canons of conduct may be sadly disillusioned. In the study of law it has not led students to believe that what is commonly termed 'the law' is a clear and simple objective entity or that there are rules of law which may after wise selection be *mechanically applied*¹² to the solution of concrete problems, etc." And again, "suppose that some (such) 'universal law' is 'found' and many others likewise. What profit have we? Will this make men moral?" "No stress is laid upon the value of the case method for training in . . . power of intelligent recognition and prudent adaptation." These seem to me wise words which I shall take to heart. I find no fault with them. Yet we may remember that even the Categorical Imperative has been of some value as a measuring rod, and my barren formulation may not be utterly useless. Conduct of an ideal sort must somehow conform to general laws, however barren in themselves; but it should not be forgotten that I have said "men get their moral impulsive power through loyalty to some group, however small or large." This statement, as well as many others, needs the support of collected cases. Its formulation was due to the study of cases, for, previous to this study, my personal conviction had been quite the contrary.

We do not, indeed, have courts of approval, as was expressly pointed out; but we can judge by the tendency of progressive legislative acts as to probable approvals. One does not need to know all the points of a curve in order to plot it. There is a tendency in disapprovals which, reversed, tells us pretty plainly what approvals will

¹⁰ Cf. (1), page 346.

¹¹ Cf. (3), page 493.

¹² Italics mine.

be. Consider a case from daily life not passed upon formally by any court. A man has a "swollen fortune" gained by methods which many people, influenced by intuitive morals, loudly condemn. Some impassioned speaker denounces his "tainted" money and declares that *society* condemns such gains. Under the circumstances one is justly suspicious of the speaker, for *society* invites the rich man in question to dinners and house parties, gives large receptions in his honor, sends him upon embassies, elects him to directorates, accepts his money for colleges, churches, and hospitals, breaks its very neck to see him when he appears in public, and so on. Any member of the largest group to which he belongs would feel elated at the thought of being allied to his family in marriage (I am drawing a composite portrait). Is this condemnation? Then we must have passed with Alice through the Looking Glass.

The case system seems to Professor Powell to be adapted to give men the "ethical mind" and he thinks this valuable. This is its chief function as a system of *teaching* the subject. Particular virtues can not be taught in class except as the class is itself a particular group and has its own loyalties, but discrimination can be taught there. I am so far an Aristotelian that I consider no action virtuous which is not conceived to be so. But, when I said that "every teaching of ethics should be adapted to make men ethical," my thought was, not so much to give them the "ethical mind" as to make them act in the way which shall have been found, *at the end of our study*, to be ethical. Naturally, at present, we are prejudiced against murder, adultery, theft, lasciviousness, and the like. It is not probable that we shall ever feel otherwise. Yet, as ethics has been taught in the past it seems to me to have had very little influence upon its students to prevent such misdemeanors and crimes. Can not we find a way to make men practise what they profess to believe?¹³ The actual use of cases inductively makes me skeptical about teaching them anything but discrimination, *i. e.*, giving them the "ethical mind." The rest, the greatest part must come from their recognized position as members of *some group* to which they are loyal. Apparently the most universal morality will come from consciousness of membership in the human family. If so, this will be an interesting corroboration from the scientific side of the ethics of the great religions. Ethics is powerless to initiate, but all-powerful to guide.

Professor Powell asks:¹⁴ "Are we forced to conclude that the intellect, if it fail to discover an 'objective morality,' must retire and leave to 'temperament' the task of making moral judgments?"

¹³ Cf. "The Ignominy of Being Good," Max Eastman, *Atlantic Monthly*, January, 1912.

¹⁴ Cf. (3), page 493.

Perhaps my answer to this has already been sufficiently indicated. The evidence so far at hand seems to show that a man's final ethics will be largely a matter of his own formulation, *the way in which he wills to have his world*. Trained in a certain fashion of living, loyal to typical responses which he has come to love, a man finds, in the conflict of interests, that he always chooses after his admirations. How could he do otherwise? He comes to love for their own sake virtues which, originally, were only means to the end of self-preservation. He has been trained to love truth-telling which now at times is highly inconvenient, detrimental, even destructive; but he can not give it up. Though all his prosperity in life were to depend upon it, he can not lie. Truth-telling has acquired (whatever his ultimate metaphysics may be) an absolute value for him.

Thus a man creates his own world of moral values. Original endowment plays a large part (the largest, in my opinion); education and environment contribute. The world of his satisfactions is his own world, social, because no one can live without approvals, and he appeals to a chosen, if countless, crowd of witnesses. This is what I meant by temperament and tradition; this is implied in my phrase "liberty of propaganda." Logically, there follows charity, toleration of the ethics of others, with, at the same time, a rigid adherence to one's own. Those standards alone are truly absolute for a man which are followed when no one observes, when all inhibitions and restraints are removed—those things which he *wills* to have realized.

This seems a far cry from the search for universal and objective ethics, which may be interpreted as some remnant of a heart hunger to know what religious people call the *will of God*. In the failure to know this or to reach an objective ethics the resulting individualism may be called a final appeal to the universe to realize, in part at least, what one has conceived that will of God to be. The certain outcome appears to be this: No man can act morally except upon *his own* ethics. Since, however, men are more like than different, an ultimate similarity of ethical judgments may confidently be expected, but there is no danger of an absolute uniformity. Perhaps, if there were, all the sorrows and all the joys of this world would disappear together; and the need of ethics would vanish with the attainment of an ideal.

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